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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 278 Misc.

MARY GIBBONS,
Petitioner,

vs.

HUGO E. BRANDT and RUTH E. BRANDT,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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The Scheffer Printing Company, FInancial 6-3044

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

MARY GIBBONS, Petitioner, vs. HUGO E. BRANDT and RUTH E. BRANDT, Respondents.	On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The Circuit Court of Appeals' original opinion is reported in 170 F. 2d-No. 5, commencing at page 385, and the opinion of said Court on Rehearing is reported in 170 F. 2d-No. 5, commencing at page 389. The District Court's opinion is reported in 75 F. Supp. 42.

Jurisdiction.

The petition contains no statement disclosing the basis upon which petitioner contends that this Court has jurisdiction; but the Petitioner's Brief, page 13, indicates that jurisdiction is invoked under Sections 1254(1) and 2101(c) of the Judicial Code. Petitioner's petition for rehearing, filed in the Circuit Court of Appeals, Seventh Circuit, was denied on September 23, 1948, (Typed Rec. 8 & 9); and the petition for a writ of certiorari was filed on December 17, 1948.

Questions Presented.

The questions presented are whether such fraud as was found by the District Court constitutes a defense; and whether the District Court was warranted in finding that fraud.

Statute Involved.

Sections 14 and 15 of Article VI of the Illinois "Liquor Control Act", being "An Act relating to Alcoholic Liquors", approved and in force January 31, 1934, are involved. (Laws of Illinois, 58th General Assembly, First, Second and Third Special Sessions of 1933-1934, pages 72 and 73. Ill. Rev. Stat. 1947, Ch. 43, §§135 and 136, page 1487).

Statement.

In the Summary Statement of the Matter Involved (Petition p. 1) and elsewhere throughout the Petition and Brief in Support, incorrect and partially incorrect statements are made.

Petitioner refers to the alleged sale of liquor as "illegal", or a "violation" or a "breach" of law. (Petition pp. 1, 7 and 9; Petitioner's Brief pp. 14, 27 and 28). The record contains nothing to substantiate the assertion of illegality.

Petitioner says: "These same respondents attacked the judgment in the state appellate courts and *among other grounds alleged the inconsistent testimony here complained of but failed there to charge it as fraudulent.*" (Petition, p. 2-Emphasis ours). Petitioner quotes a passing comment by the Illinois Supreme Court, to the effect that there is no contention of fraud, and adds: "They *there* had the opportunity to raise any bona fide question of fraud, but

failed to do so * * *." (Petitioner's Brief, p. 17-Emphasis ours). In said Brief, at page 18, petitioner says: "In *Gibbons* v. *Brandt, supra,* these respondents had an opportunity to raise any question of fraud in the procurement of the judgment, if any fraud in fact existed, but failed to do so." Under "Questions Presented", petitioner says that the Supreme Court of Illinois "has already passed, or could have passed, upon" the question of petitioner's fraud in obtaining her judgment against Cannaven. (Petition pp. 8, 9). Finally petitioner says: "This identical matter had been presented to the Supreme Court of Illinois, *Gibbons* v. *Brandt,* 393 Ill. 376". (Petitioner's Brief, p. 27). The fact is that the question whether petitioner's judgment against Cannaven was procured by fraud, was not presented in the proceedings in the Illinois Appellate and Supreme Courts; petitioner offered no evidence in this case tending to show that said question was presented in said other proceedings; and, as we shall show in our argument, no such question could have been so presented.

At pages 3 and 4 of the petition, petitioner says the District Court found that the Cannaven judgment was "probably" procured by false testimony, and then petitioner refers this Court to the District Court's Memorandum opinion. Actually the District Court's findings are contained in the decree. (R. 179-181, 182-184; 75 F. Supp. 42, 43-44, 44-45). The presently pertinent findings of the District Court are:

> 2. That the plaintiff herein, Mary Gibbons, procured the judgment of the Circuit Court of Cook County, Illinois, which was entered in the case of said plaintiff against John Cannaven by the following means:
>
> (a) upon the trial of said case said plaintiff testi-

fied falsely as to the extent to which she was prevented by the injury that was involved in said case, from working and earning money by working, said plaintiff having testified upon said trial to the effect that the period from the occurrence of said injury until she was first able to work and earn money thereafter, she having been incapacitated by said injury from so doing throughout said period, was substantially longer than in truth said period really was, and to the effect that the portion of the period from the occurrence of said injury until the time of the trial of said case, during which portion of said period she was prevented by said injury from working and earning money, was substantially greater than in truth said portion of said period really was.

(b) said plaintiff procured her counsel, upon his argument to the jury at the conclusion of the trial of said case to substantially misrepresent and overstate, in accordance with false testimony knowingly given by said plaintiff as a witness at said trial, the extent to which said plaintiff had been prevented by the injury that was involved in said case, from working and earning money by working.

(c) by means of false testimony knowingly given by said plaintiff as a witness as aforesaid, and by means of false argument to the jury of plaintiff's counsel, induced by and in accordance with said false testimony, plaintiff misrepresented to the court and jury in the aforesaid trial that the aforesaid injury to her was substantially greater than in fact said injury really was. (R. 182-183; 75 F. Supp. 42, 44-45).

Petitioner implies that the finding that she testified falsely at the Cannaven trial is based solely upon the inconsistencies in her testimony at that trial; and that respondents' only exhibits were the documents making up the transcript of the Cannaven trial. (Petition p. 3). The records of one of petitioner's employers were exhibits introduced in evidence by respondents (Defendants' Exhibits

E and E-1 to E-25, both inclusive, (R. 136-177). The inconsistency of these employment records with parts of plaintiff's testimony, and with the arguments of her counsel, all at the Cannaven trial, will be pointed out in our argument herein.

Although petitioner implies that the second opinion of the Circuit Court of Appeals bases its finding of fraud solely upon petitioner's false testimony in the Cannaven case (Petition p. 6), weight was also given to the false argument of petitioner's counsel made by him in accordance with petitioner's false testimony. That Court said:

> "The trial court expressly found that plaintiff testified falsely * * *; that she caused her counsel substantially to misrepresent and overstate the extent to which she had been prevented by injuries from working and earning money and that, by means of such false testimony and argument, plaintiff misrepresented to the court and the jury that her injury was substantially greater than it really was." (Typed Rec. 6, pp. 2 & 3; 170 F. 2nd No. 5 page 385, at page 390, column 2).

Petitioner says the District Court found that the issues involved before the District Court had been determined by a verdict in the Circuit Court of Cook County. (Petitioner's Brief p. 15). What the District Court found was that "The question of the extent of Gibbons'," petitioner's, "injuries" was submitted in the Cannaven trial, not that any question ever was raised in that trial as to petitioner's fraud. (R. 184). As appears from the transcript of the trial in the *Cannaven* case (Defendants' Exhibits, A, B, C, and D, R. 34, 35, 36, 45-136), the records of petitioner's employment by General Finance Corporation (Defendants' Exhibits E and E1 to E25, inclusive, R. 39, 136-177) were not put in evidence at that trial, and

there was no evidence to contradict petitioner's testimony as to the extent of her claimed injury.

Petitioner asserts that respondents had an opportunity to defend the action against Cannaven (Petitioner's Brief p. 18), and refers to Appendix "A", an unexecuted form for an affidavit by petitioner's counsel. (Petitioner's Brief p. 33). The "affidavit" is no part of the record in this case, either executed or unexecuted. No part of the substance of the form for affidavit was offered in evidence.

Petitioner says that Cannaven was "unable" to pay the judgment against him. (Petitioner's Brief, p. 20). The record contains no evidence to that effect. The only evidence is that petitioner never "collected on" the judgment. (R. 28).

Summary of Argument.

ARGUMENT.

In an action under the Illinois Liquor Control Act to enforce against tavern premises which the owners rented for tavern purposes or knowingly permitted to be used for such purposes, a judgment already recovered against the operator of the tavern, it is a defense that the judgment was recovered by fraud. It is immaterial whether the fraud took the form of collusion, whether it was directed primarily against the owners of the tavern property, and whether the fraud was as to matters submitted to the jurisdiction of the court which entered the judgment, or was as to matters affecting the jurisdiction of said court.

Both in its original opinion and in its opinion upon rehearing, the Circuit Court of Appeals, Seventh Circuit, found the Illinois law to be as stated immediately above. (Typed Rec. 2 pp. 4 & 5; 170 F. 2d-No. 5, at page 388, column 1; Typed Rec. 6 p. 2; 170 F. 2d-No. 5, at page 390, column 1.) The Circuit Court of Appeals, among other cases, cited:

Wall v. *Allen,* 244 Ill. 456.
Wing v. *Little,* 267 Ill. 20, and,
Garrity v. *Eiger,* 272 Ill. 127.

Wall v. *Allen,* 244 Ill. 456, and *Garrity* v. *Eiger,* 272 Ill. 127, were each decided under the former Illinois "Dram Shop Act", identical for all present purposes with the Illinois Liquor Control Act now involved. In each case a judgment had been recovered against a tavern operator and the suit was to enforce the judgment against the tavern

premises. In each case the owner, or owners, of the tavern premises demurred to the bill of complaint because it did not, in addition to alleging the recovery and nature of the judgment, and that the judgment was unpaid, also allege the truth of the supposed facts upon which the judgment was based, and thus proffer an issue as to the very things which had been adjudicated against the tavern operator. In each case the trial court overruled the demurrer and the Illinois Supreme Court affirmed the ruling, thus settling the Illinois law to the effect that in a case such as the present one, it is not an essential part of the plaintiff's (petitioner's) case that the facts upon which the judgment against the tavern operator is based, are true. In each case, however, reference is made to the fact that if the judgment against the tavern operator was obtained by "fraud or collusion", then that fact may be used as a defense against the enforcement of the judgment against the tavern premises. *Wall* v. *Allen*, 244 Ill. 456, 463; *Garrity* v. *Eiger*, 272 Ill. 127, 133, 137, 138.

Wing v. *Little*, 267 Ill. 20, was a suit in equity, brought by Wing to enforce a judgment against certain premises which the owner, Little, had, so a jury found by its verdict (267 Ill. at page 23), knowingly permitted to be used for gambling. The judgment was in favor of Wing and against one Adams, for money allegedly lost by Wing to Adams, at gambling. The statute was quite similar to the Illinois Dram Shop Act. (267 Ill. at pages 24-25). Little filed a plea that there had been no money lost by Wing to Adams, and that the judgment was the result of collusion between Wing and Adams to recover from Little and divide the recovery between them. On motion of Wing the plea was stricken (267 Ill. at page 22). Little set up the same allegations by cross-bill, and a demurrer to the cross-bill was sustained (267 Ill. at pages 22-23). After

a trial on the original bill, an amended answer, and a replication, involving only one question of fact, namely, whether Little had knowingly permitted the premises to be used for gambling, there was a verdict and decree for the complainant, Wing. The Illinois Supreme Court reversed, saying that "fraud or collusion" was, if proven, a defense. (267 Ill. 26, 27 & 28).

Wing v. *Little,* 267 Ill. 20, was cited with approval in *Garrity* v. *Eiger,* 272 Ill. 127, at pages 133 and 137. This Court affirmed the Illinois Supreme Court in *Eiger* v. *Garrity,* 246 U. S. 97. Both this Court and the Illinois Supreme Court held that the Illinois Dram Shop Act was not subject to attack on constitutional grounds, and in doing so, specifically mentioned the fact that when it is sought to enforce against tavern premises, a judgment previously recovered against the tavern operator, the owner of the tavern premises may show as a defense that the previous judgment was recovered by "fraud or collusion". (*Eiger* v. *Garrity,* 246 U. S. 97, 102; *Garrity* v. *Eiger,* 272 Ill. 127, 133, 137, 138).

Petitioner's suggestion that any fraud which does not amount to collusion, does not constitute a valid defense (Petition, p. 3; Petitioner's brief, pp. 16, 27), is refuted by the many cases which announce the rule that a third person against whom it is sought to use a judgment, may attack the same collaterally for "fraud *or* collusion". It is more emphatically refuted by those cases announcing the rule that the collateral attack may be for "fraud of either of the parties" or "collusion of both".

Wing v. *Little,* 267 Ill. 20, 27.
Indiana Harbor Belt R. R. Co. v. *Calumet City,* 391 Ill. 280, 288.
Elting v. *First Nat. Bank,* 173 Ill. 368, 391.

The case of *American Nat. Bank* v. *Supplee,* 115 Fed. 657, cited by petitioner, (Petitioner's Brief, p. 16) as supporting the contention that only fraud amounting to collusion may be availed of, involved no question of Illinois law. The question was how far a stockholder of a corporation was bound by a judgment against the corporation, and only as to the stockholder's interests as such stockholder, and was governed entirely by Kansas law.

Petitioner takes no exception to the holding of the Circuit Court of Appeals that the fraud, to be a defense, need not be "directed primarily against" the respondents. *Johnson* v. *Waters,* 111 U. S. 640, and *Mettler* v. *Warner,* 249 Ill. 341, were cited by the Circuit Court of Appeals. (Typed R. 2 p. 4; 170 F. 2d—No. 5—385, at page 388 column 1). In those cases it did not appear that the fraud was directed "against" anyone, but only "in favor of" the guilty parties.

Petitioner quotes from *Gibbons* v. *Cannaven,* 393 Ill. 376, at pages 391 & 392, to the effect that respondents may not, in the Cannaven suit or "in any other proceedings" challenge the Cannaven judgment, but have only the right to litigate whether the Cannaven judgment was in fact entered, and whether any part of the same remains unpaid (Petitioner's Brief, p. 16); and petitioner argues throughout her petition and brief, that said matters are the only ones which may be litigated in the present suit. The quotation is misleading, being of language out of its context. In its opinion in the *Cannaven* case the Illinois Supreme Court quotes from the opinion in *Wall* v. *Allen,* 244 Ill. 456, at 463, language referring to the fact that "fraud or collusion" is a defense. (393 Ill. 376, at 394). The language quoted by petitioner from the Illinois Supreme Court's opinion in *Gibbons* v. *Cannaven,* 393 Ill. 376, 391-392, was used in the course of a discussion of

the cases of *Wall* v. *Allen,* 244 Ill. 456, and *Garrity* v. *Eiger,* 272 Ill. 127, which involved the question whether a party in petitioner's position must allege the truth of the supposed facts upon which the previous judgment is based, and the quoted language, though suffiiciently broad to apply to affirmative defenses in an equity suit such as the present one, actually, in its context, has no such application.

Petitioner says that the Circuit Court of Appeals committed error by failing to distinguish between "*intrinsic* and *extrinsic* fraud" in a collateral attack upon a judgment (Petitioner's Brief, p. 14 par. 5, and elsewhere throughout said brief).

There are many opinions by the Illinois Supreme Court and by other courts announcing the rule that a judgment may not be attacked collaterally for fraud unless the fraud is in a matter affecting the jurisdiction of the court which entered the judgment, or "extrinsic fraud", and that fraud in a matter submitted to the jurisdiction of a court which entered a judgment, or "intrinsic fraud", is no ground for a collateral attack upon the judgment. Of these opinions, many, possibly most, mention no exception allowing collateral attack upon a judgment for intrinsic fraud when it is sought to use the judgment against a person who is not a party or privy to the same, and who, without fault, had no opportunity to defend against its entry.

Whenever the point has been involved or discussed in an opinion, insofar as any authority has come to our attention, it has invariably been held that if it is sought to use a judgment against a person not a party or privy to the same, or who, without fault, had no opportunity to defend against its entry, said person may attack the judgment for fraud in a matter submitted to and not affecting the jurisdiction of the court which entered the judgment,

as well as for fraud in a matter affecting said court's jurisdiction. Among the cases announcing or applying this latter rule are:

Johnson v. *Waters,* 111 U. S. 640, 659, 667-670.
Mettler v. *Warner,* 249 Ill. 341, 346-347.
Bernero v. *Bernero,* 363 Ill. 328, 331-332.
People v. *Sterling,* 357 Ill. 354, 360, 361, 362.
Green v. *Hutsonville School District,* 356 Ill. 216, 221-222.
Moore v. *Sievers,* 336 Ill. 316, 322.
Elting v. *First Nat'l. Bank,* 173 Ill. 368, 391.
Farwell v. *Great Western Tel. Co.,* 161 Ill. 522, 600.
Wing v. *Little,* 267 Ill. 20, 26, 27.
Garrity v. *Eiger,* 272 Ill. 127, 133, 136, 137.
Indiana Harbor Belt R. R. Co. v. *Calumet City,* 391 Ill. 280, 287, 288.

Petitioner argues, it seems, that respondents are privies of Cannaven, and therefore cannot use petitioner's fraud in obtaining the Cannaven judgment as a defense in the present suit, such fraud being in a matter submitted to the jurisdiction of the court which entered the Cannaven judgment (Petitioner's Brief, pp. 18, 19). The argument would leave no basis for the holding in *Wing* v. *Little,* 267 Ill. 20. Furthermore, even if it be conceded that there was privity between Cannaven and respondents as to the premises at one time demised to him, while the demise continued in effect, or if the extreme position be accepted that respondents were in privity with Cannaven as to his tavern business, nevertheless it does not follow that respondents are in privity with Cannaven as to the judgment which petitioner recovered against Cannaven. In *Schafer* v. *Robillard,* 370 Ill. 92, the Illinois Supreme Court said, at page 100:

"A privy to a judgment or decree is one whose

succession to the rights of property thereby affected occurred *after* the institution of the particular suit, and from a party thereto." (*Orthwein* v. *Thomas,* 127 Ill. 554; Freeman on Judgments, 3d ed. sec. 162; 34 Corpus Juris, "Judgments," 974)." (Emphasis ours)

Petitioner argues that any fraud in the recovery of the Cannaven judgment is not a defense in the present case because such fraud concerns only the amount of damages, and not the question of liability (Petition pp. 2, 7, 8, 9; Petitioner's Brief p. 29). At page 22 of the brief petitioner says, in substance, that the fraud is not a defense because fraud as to damages is fraud as to a matter not material to the issues; and at page 25, petitioner says that error as to the amount of damages is harmless. *Cox* v. *Hraskey,* 318 Ill. App. 287, at 293 is cited. That case does contain language, at page 294 (of 318 Ill. App.), which, taken out of its context, supports the anomalous contention that error as to the amount of damages is harmless. What the case really holds is that under Illinois appellate practice, error in the admission of evidence as to the amount of damages is not a ground for reversal at the instance of a defendant unless the defendant assigns as error that the damages are excessive. The cases cited in *Cox* v. *Hraskey,* 318 Ill. App. 287, at 294, make this meaning of the case unquestionable.

Reisch v. *People,* 130 Ill. App. 164, and,
Semrau v. *Calumet & S. C. R. Co.,* 185 Ill. App. 203.

Petitioner assumes that fraud in obtaining the Cannaven judgment must amount to perjury if it is to be a defense in the present suit, and apparently concedes that if the fraud does amount to perjury, then it is a defense (Petition p. 10 paragraph 5; Petitioner's Brief p. 22). Apparently all authorities which exist are to the effect that

false testimony bearing only upon the amount of damages and not upon the question of liability, may be "material" and amount to perjury within the law as to perjury, the other requirements for that crime being met.

48 Corpus Juris page 841, Perjury §45.

The opinion of the Circuit Court of Appeals, upon rehearing, sufficiently disposes of the contention that fraud in obtaining the Cannaven judgment is no defense unless the fraud amounts to perjury. (Typed Rec. 6 pp. 4, 5; 170 F. 2d-No. 5, at page 391, paragraph [9]).

The difficulty created by the fact, if it is a fact, that petitioner would be entitled to enforce a judgment for some amount, if the judgment had been obtained without fraud or collusion, and that we cannot know what that amount would be, is a difficulty of petitioner's own making. It is a general principle of equity that one who does not come into equity with "clean hands", can have no relief whatsoever.

Precision Co. v. *Automotive Co.,* 324 U. S. 806, 815.

Commerce National Bank v. *Burch,* 141 Ill. 519, 530 & 531.

Plenderleith v. *Glos,* 329 Ill. 382, 386, 388.

It would certainly be inconsistent with this general equitable principle to allow petitioner to avail herself of a judgment procured by her fraud, simply because it cannot be known how much of the judgment was due to the fraud.

Prior to the present suit there was no adjudication as to whether petitioner procured the Cannaven judgment by fraud.

Petitioner argues that "the issues complained of" were submitted to the court which entered the Cannaven judg-

ment (Petitioner's Brief, p. 15); that respondents in the present case "seek to retry the issues involved" (Petitioner's Brief, p. 21); and that if respondents prevail it will be necessary for a person in petitioner's position "to retry the case" when seeking to enforce against tavern premises a judgment such as petitioner's judgment against Cannaven (Petitioner's Brief, p. 30). At page 29 of the brief petitioner argues that the Circuit Court of Appeals has allowed "a review of the proceedings upon which the judgment" against Cannaven "was entered".

Petitioner mentions that the Illinois Supreme Court, in *Gibbons* v. *Cannaven,* 393 Ill. 376, said, at page 379: "There is no contention that the judgment against Cannaven was procured by fraud" (Petition, p. 2, Petitioner's Brief, p. 17). She argues sometimes that the question whether petitioner procured the Cannaven judgment by fraud should have been raised by respondents in the appeal from that judgment (Petition pp. 8 & 9, paragraph "1"; Petitioner's Brief pp. 17, 18), and on one occasion she asserts that the identical matter was presented to the Illinois Supreme Court (Petitioner's Brief, p. 27).

In all the Illinois state court proceedings in the case of *Gibbons* v. *Cannaven,* there never was and there never could have been, any adjudication as to whether the Cannaven judgment was procured by fraud. Of course no such question could have been raised upon the Cannaven trial, which occurred prior to the entry of the Cannaven judgment. What the Illinois Appellate Court decided, and what the Illinois Supreme Court affirmed, was that respondents could have no appellate review of the Cannaven judgment, on any ground.

Gibbons v. *Cannaven,* 325 Ill. App. 337.
Gibbons v. *Cannaven,* 393 Ill. 376.

In its context the Illinois Supreme Court's statement: "There is no contention that the judgment against Cannaven was procured by fraud", had no meaning different than if the statement had been: "In these proceedings there can be no contention that the judgment against Cannaven was procured by fraud". Even if it had been decided that the respondents could appeal from the Cannaven judgment, they could not, on appeal, have introduced any new evidence or raised any question except as to error at the trial.

Schmidt v. *Life Assurance Society,* 376 Ill. 183, 197-198.

People ex rel v. *Ferro,* 313 Ill. App. 202, 229-230.

Ockenga v. *Alken,* 314 Ill. App. 389, 397.

Defendants' Exhibits B, C and D, being, together, a transcript of the proceedings on the Cannaven trial (R. 35, 36, 46-136) show that there was no contest in that trial as to the extent of the claimed injury, much less any question whether petitioner's (then the plaintiff's) testimony as to that matter was knowingly false.

There is no question of "retrying" the *Cannaven* case. The final opinion of the Circuit Court of Appeals is based on petitioner's "undeniable fraud" (Typed R. 6, p. 4; 170 F. 2d-No. 5—at page 391, column 1), consisting of "gross misrepresentation which could have resulted only in deception of the jury in its determination of plaintiff's damages". (Typed R. 6, p. 3; 170 F. 2d-No. 5—at page 390, column 2, paragraph 5). To establish that a judgment was procured by fraud is to meet a much greater requirement than is involved in retrying a case and obtaining a different result than was reached upon the first trial.

The procedure adopted by respondents to avail themselves of petitioner's fraud, as a defense, was the correct procedure.

Petitioner objects to the interposition, by answer, of the defense of fraud. (Petition pp. 2, 9; Petitioner's Brief pp. 2, 28). At pages 21 and 25 of the brief, petitioner insists that there should have been a "direct" attack upon the Canaven judgment. At page 26, petitioner asserts that an "original bill" or "new suit" is necessary. At page 23, petitioner cites *Wing* v. *Little,* 267 Ill. 20, for the proposition that a cross-bill is "a proper mode" of interposing the defense of fraud.

In *Wing* v. *Little,* 267 Ill. 20, the Illinois Supreme Court said, at pages 27 and 28:

> "It follows from the rule above announced that the trial court erred in striking the plaintiff in error's amended plea from the files and in sustaining a demurrer to the cross-bill. The issue sought to be raised by these pleadings was the fraudulent character of Wing's judgment. *This question might have been determined, as a matter of defense, under plaintiff in error's amended plea which was stricken.* If that plea had been sustained by proof it would have defeated defendant in error's cause of action, but it would have left the judgment in full force as a possible basis for future proceedings against the plaintiff in error. The error committed in striking the plea from the files might have been cured had the court allowed plaintiff in error's cross-bill to stand. The cross-bill was a proper mode of defense and was germane to the subject matter of the original bill. The prayer of the cross-bill was that the judgment be canceled and declared absolutely void. This prayer was broader than the relief to which the plaintiff in error was entitled. Even if the judgment was fraudulent and collusively obtained, the parties to such judgment should be left in the position, in respect thereto, that they

have voluntarily assumed. * * * It is of no importance to plaintiff in error what becomes of the judgment as between Wing and Adams. All the relief he is entitled to is to be protected from the enforcement of the judgment against his property, but this defect in the prayer of the cross-bill did not warrant the court in sustaining a demurrer to and dismissing the cross-bill for want of equity." (Emphasis ours)

The evidence supports the finding of the District Court, approved by the Circuit Court of Appeals, on rehearing, that petitioner's judgment against Cannaven was procured by petitioner's fraud.

The petitioner questions the sufficiency of the evidence to support the finding of fraud (Petition, p. 10, paragraphs "5" and "6"), and assigns that the Circuit Court of Appeals committed error "7. By its misconception of the evidence". (Petitioner's Brief p. 14). Petitioner, at pages 3, 6 and 7 of the petition, refers to certain *parts* of her testimony at the Cannaven trial, some of which *parts* of her testimony were not shown to be false. Nowhere in the petition or the brief is any explanation attempted for the fact that petitioner's counsel, in his opening statement at the Cannaven trial said: "During all of this time she was unable to work. She isn't working due to her jaw. * * * Now she hasn't been able to work for two years and in addition to that there are numerous hospital doctors and X-ray bills." (R. 59); that petitioner testified as a witness: "I haven't been able to work at all." (R. 65); that petitioner's counsel, in his final argument to the jury, said:

> Getting down to the monetary value, we have proven that she earned $20.00 a week. She has been off over two years. Now, in that two years she worked seven weeks. A mathematical computation, she would have earned $2,280.00. Supposing we subtract the

seven weeks she has worked, that is $142.00, which would leave a loss of wages of $2,140.00, of wages. (R. 127);

that, as the Circuit Court of Appeals found, on rehearing, from an analysis of petitioner's employment record with the General Finance Corporation, "it is undisputed that" petitioner "resumed her employment within less than two months". (Typed Rec. 6 p. 3; 170 F. 2d-No. 5—at page 390 column 2); that in said resumed employment she worked from October 7, 1940 to March 1, 1941, when she was discharged so that she might be replaced by a man (Defendants' Exhibits E and E1 to E25, especially E1, E7, E8, E9, E10 and E11; R. 39, 136-177); and that in addition to the former employment which she resumed after the alleged injury, she had other employment before the time of the Cannaven trial. (R. 72-73).

The particulars in which petitioner's testimony at the Cannaven trial was false, establish that it was knowingly false, and hence fraudulent. If there had been any doubt on that score, the same would have been removed by petitioner's failure in the present case to take the stand and explain, if she could, her testimony at the Cannaven trial.

CONCLUSION.

Petitioner has shown no sufficient reason for review by this Court of the decision of the Circuit Court of Appeals, and her petition for a writ of certiorari should be denied.

Respectfully submitted,

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Henry T. Martin
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CHARLES ELMORE CROPLEY
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MARY GIBBONS, Petitioner, vs. **HUGO E. BRANDT and RUTH E. BRANDT,** Respondents.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

RESPONSE TO PETITION FOR REHEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

It is submitted that the Petition for Rehearing should be denied because it fails to comply with Rule 33, paragraph 2, of the rules of this Court, in that:

1. Said petition fails to state any intervening circumstances of substantial or controlling effect;

2. Said petition fails to state any substantial grounds not previously presented;
and,

3. Said petition is not supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, nor does counsel certify that said petition is restricted to the grounds specified by the aforesaid Rule 33, paragraph 2.

I.

The Petition for Rehearing fails to state any intervening circumstances of substantial or controlling effect.

The Petition for Writ of *Certiorari* at pages 6 to 10, both inclusive, 13, 14, 16, 19 to 24, both inclusive, and 27, 28 and 29 argues that the Circuit Court of Appeals for the Seventh Circuit failed to apply properly the law of Illinois, sometimes urging that said Circuit Court of Appeals refused to follow the controlling Illinois authorities and sometimes urging merely that said Court failed to apply said authorities correctly. No additional point of law is urged in the Petition for Rehearing.

With one exception, each of the authorities cited in the Petition for Rehearing was cited in the Petition for Writ of *Certiorari.*

Freeman on Judgments, Fifth Edition, 1925, was cited at page 31 of the Petition for Writ of *Certiorari.*

People v. *Sterling,* 357 Ill. 354, was cited at pages 22 and 24 of the Petition for Writ of *Certiorari;* and,

U. S. v. *Throckmorton,* 98 U. S. 61, was cited at page 31 of the Petition for Writ of *Certiorari.*

Ocean Insurance Co. v. *Fields,* 18 Fed. Cases 532 (Case No. 10,406) is cited in the Petition for Rehearing, but was not cited in the Petition for Writ of *Certiorari.* The citation, without more, shows that the case is no intervening circumstance. It was decided at an October 1841 term of court.

II.

Said Petition for Rehearing fails to state any substantial grounds not previously presented.

The Petition for Rehearing contains no statement of any matter not previously presented in the Petition for Writ of *Certiorari,* nor any intimation of such a matter except by references to the "associated interests" of the "Appellees". Nothing is shown as to who or what are the "associated interests" of the "Appellees". In fact there is nothing about the judgment and opinion of the Circuit Court of Appeals in the instant case which would be of interest to any person not directly and immediately affected by said judgment any more than is usual with any opinion of said Court applying established principles of Illinois law.

Petitioner's suggestion, at pages 4 and 5 of the Petition for Rehearing, of a procedure by which owners of tavern premises may "harass injured people until they die of legal exhaustion, and thereby completely evade the obvious intent and purpose of the Illinois Dram Shop Act", is unsound, and is therefore not a substantial ground. It would be a most extraordinary case in which an owner of tavern premises could think it prudent to forego an opportunity to contest, on the merits, a claim comparable to that of the petitioner, assuming he had such an opportunity, and to rely for defense, not on his own conduct of a defense on the merits of the claim, but on his ability to establish that an adjudication in favor of the claimant, obtained in a trial in which he did not participate, was obtained by fraud or collusion. Moreover, any person having a claim such as the petitioner's may compel the owner of the tavern property to defend on the merits; and need not leave said owner with no defense except that the judgment procured against the

tavern operator, was procured by fraud or collusion. An owner of tavern premises, either alone or with the tavern operator, can be made a party defendant in a suit brought under Article VI, Section 14, of the Illinois Liquor Control Act; and any judgment recovered against the owner of the tavern premises in such a proceeding would be binding upon the tavern premises at least as soon and as completely as is the situation in a case like the instant one where the tavern operator, alone, is sued under Section 14, aforesaid, and thereafter a suit is brought under Section 15, of Article VI aforesaid, against the owner of the tavern premises, alone. (Laws of Illinois—58th General Assembly—First, Second and Third Special Sessions of 1933-1934, pp. 72 and 73, Ill. Rev. Stat. 1947, Ch. 43 §§135 and 136.) If the owner of tavern premises is a non-resident of Illinois, or cannot be personally served with process, the tavern property, or any other property which he may own, can be subjected to suit under Section 14, aforesaid, by attachment proceedings (Ill. Rev. Stat. 1947, Ch. 11).

In any event, the aforesaid suggestion urged at pages 4 and 5 of the Petition for Rehearing amounts to nothing more than was urged upon this Court at pages 29 and 30 of the Petition for Writ of *Certiorari*.

III.

Said Petition for Rehearing is not supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, nor does counsel certify that said petition is restricted to the grounds specified by Rule 33, paragraph 2, of the rules of this Court.

A copy of the Petition for Rehearing, as served upon counsel for respondents, was not accompanied by any certificate of counsel whatsoever. Inquiries made at the office of the Clerk of this Court, on the 23rd day of February, 1949, indicate that no such certificate has been filed. Apparently there has been no compliance with Rule 33, paragraph 2, of the rules of this Court.

Respectfully submitted,

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